89-959

No. 89-____

In The

Supreme Court of the United States

October Term, 1989

SERVANDO NAJERA LOPEZ,

Petitioner,

vs.

CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION THREE

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QUESTION PRESENTED*

1.

PETITIONER WAS APPROACHED BY TWO UNIFORMED POLICE OFFICERS WEARING WEAPONS WHO SURROUNDED PETITIONER OBSTRUCTING HIS FREEDOM OF MOVEMENT AND MADE INVESTIGATORY INQUIRIES.

THE QUESTION PRESENTED IS:

DID A REQUEST FOR IDENTIFICATION BY POLICE WITHOUT REASONABLE SUSPICION AFTER PETITIONER CEASED RESPONDING TO QUESTIONING CONSTITUTE A SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT SUCH THAT A REASONABLE PERSON WOULD NOT HAVE FELT FREE TO LEAVE?

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* All parties to the proceeding in the lower court are listed in the caption.

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No. 89-____

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SERVANDO NAJERA LOPEZ,

Petitioner,

vs.

CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT, DIVISION THREE

Petitioner, Servando Najera Lopez, respectfully petitions this Honorable Court to issue a Writ of Certiorari to review the judgment and opinion of the California Court of Appeal, Fourth District, Division Three, entered in the above-entitled proceeding on July 19, 1989.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth District, Division Three, is published at 212 Cal.App.3d 289 (1989), and is reprinted in Appendix A.

The decision of the Court of Appeal modifying the opinion and denying a rehearing is reprinted in Appendix B. The order of the California Supreme Court denying review is reprinted in Appendix C.

JURISDICTION

The judgment of the California Court of Appeal, Fourth District, Division Three, reversing the trial court's granting of a motion to suppress was entered on July 19, 1989. A Petition for Review was filed with the California Supreme Court on August 28, 1989. The order of the California Supreme Court denying review was entered on October 12, 1989.

This Petition was filed within 60 days of the October 12, 1989 judgment denying review. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the United States Constitution which are set forth in pertinent part in Appendix D.

STATEMENT OF THE CASE

A complaint was filed in the Superior Court of California for the County of Orange charging Petitioner with

a violation of Health and Safety Code section 11351 (Possession For Sale of Heroin) and a violation of Health and Safety Code section 11350 (Possession of Cocaine).

On April 8, 1988, a motion to suppress was heard by the Honorable John J. Ryan of the Orange County Superior Court based upon Petitioner's claim that he had been "seized" under the Fourth Amendment to the United States Constitution without reasonable suspicion.

Testimony at the hearing on the motion to suppress evidence revealed that around noon on October 22, 1986, Santa Ana Police Corporal Richard Reese, a thirteen-year veteran, and Officer Rick Ashby, a recruit, were in their patrol car patrolling for narcotics activity. Both officers were in full uniform with badges and guns visible. The officers pulled into a parking lot near a local bar, got out of their patrol car, and walked toward Petitioner who was sitting on the hood of a car parked in front of the bar. One of the officers thought he recognized Petitioner from a prior contact, but could not remember what the encounter had been about.

As the two uniformed officers approached Petitioner, Officer Reese asked him if he owned the car. Petitioner responded that he did not. Officer Reese then asked Petitioner why he was sitting on the car, and Petitioner replied that he was just waiting for his friends to play a game of pool. Officer Reese was aware the bars nearby did have pool tables. The officers stopped walking, took up positions on both sides of Petitioner within 1-2 feet of him, and requested that he explain where his pool stick was, in light of his claim that he was waiting to play pool. Petitioner did not respond.

After Petitioner failed to answer this question, Officer Reese requested that Petitioner produce some identification. Petitioner complied with this request by reaching into his pocket and withdrawing his wallet. Officer Ashby took the wallet from Petitioner and opened it. As Officer Ashby opened the wallet, Officer Reese observed a street folded coke bindle "pop up." At this point, according to Officer Reese, Petitioner was no longer free to leave. No argument was made that the officers had any reasonable suspicion of criminal activity prior to seeing the cocaine.

At the conclusion of testimony, Petitioner's motion to suppress was granted, and the charges for possession of heroin and cocaine were dismissed, based upon the court's determination that a seizure had taken place leading to the discovery of the cocaine.

Thereafter, the People of the State of California filed a timely notice of appeal. On appeal, the California Court of Appeal, Fourth District, Division Three, held that the actions of the police officers constituted a mere request for identification, and found that no seizure had occurred, reversing the findings of the trial court.

Petitioner then filed a petition for rehearing with the Court of Appeal. On August 8, 1989, the Court of Appeal, Fourth District, Division Three, issued an order modifying its earlier opinion (inserting a footnote reference), and denying the petition for rehearing.

Petitioner petitioned the California Supreme Court to review the decision of the Court of Appeal, but review was denied. This Court is now being petitioned in the matter.

REASONS FOR GRANTING THE PETITION

This case presents this Court with an opportunity to rule on two questions of federal law which should be decided by the Supreme Court. The first question invites this Court to provide much needed guidance in determining what factors should be taken into account in determining when a police encounter rises to the level of a seizure within the meaning of the Fourth Amendment. Secondly, if this Court adopts the view taken by the Court of Appeal that the actions of the police officers constituted a mere request for identification, this Court has the opportunity to address a question specifically left open in *INS v. Delgado*, 466 U.S. 210 (1984) – whether mere questioning of an individual by a police officer, without more, can amount to a seizure under the Fourth Amendment.

Existing case law leaves lower courts groping blindly in very poor lighting for any concrete instances of conduct by the police which will differentiate between a consensual encounter and a seizure. Although this Court has suggested that no litmus-paper test exists to distinguish the two, *Florida v. Royer*, 460 U.S. 491, 506 (1983), the current confusion in the lower courts suggests the need for more guidance. Furthermore, there is an urgent need for police officers to have guidelines with which to conform their conduct in order to avoid running afoul of the Fourth Amendment.

The message that has been sent out by the California Court of Appeal and the California Supreme Court is that without arousing any reasonable suspicion whatsoever a law abiding citizen may be approached by armed police officers in a public place, surrounded so that his path is

obstructed, asked accusatory questions, continued to be questioned after he has chosen not to respond, and requested that he produce identification, all without the protection of the Fourth Amendment.

I.

THE OFFICER'S REQUEST FOR IDENTIFICATION IN VIEW OF ALL THE SURROUNDING CIRCUMSTANCES CONSTITUTED A SEIZURE OF PETITIONER.

The Fourth Amendment, applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), provides:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause. . . ."

Justice Stewart, in a concurring opinion in *United States v. Mendenhall*, 446 U.S. 544 (1980) first formulated the test to be used to determine whether a detention, or seizure, has occurred within the meaning of the Fourth Amendment to the United States Constitution.

> "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable man would have believed that he was not free to leave." *Id.*, at 554

This test was subsequently adopted by this Court in *INS v. Delgado*, 466 U.S. 210, 215 (1984).

In *Mendenhall*, Justice Stewart outlined several circumstances relevant to the determination of whether a seizure has occurred including the threatening presence

of several officers, the display of weapons, some physical touching of the citizen, and the use of language or tone of voice indicating that compliance with the officer's request might be compelled. 446 U.S. at 554.

A considerable number of circumstances recognized by this Court as indicative of a seizure coalesced in this encounter to create a seizure of Petitioner. Although none of them taken separately might rise to the level of a seizure, all the circumstances surrounding the incident taken together point to an atmosphere in which a reasonable person would not have felt free to leave.

A. THE POLICE OFFICERS EXERCISED A SHOW OF AUTHORITY.

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court recognized that a police officer may effectuate a seizure by a show of authority. 392 U.S. at 19, n. 16. Several factors have been considered by the courts as constituting a show of authority. The number and position of officers have been recognized as "important considerations for determining whether an atmosphere of restraint can be said to have existed." *United States v. Berryman*, 717 F.2d 651, 655 (1st Cir. 1983); *United States v. Mendenhall*, 446 U.S. at 554. The display of weapons also is a factor to be considered. *United States v. Mendenhall*, 446 U.S. at 554.

In this case, two armed and fully uniformed police officers pulled into a parking lot near Petitioner in their patrol car. Both officers got out of their car and walked in the direction of Petitioner. As they approached, they began to question Petitioner, finally coming to a stop in front of him. Such a display of authority could certainly

reasonably diminish Petitioner's feeling that he was free to leave.

B. THE POLICE OFFICERS OBSTRUCTED PETITIONER'S FREEDOM OF MOVEMENT.

Another factor that is taken into account in determining whether a seizure has occurred is the obstruction of the person's freedom of movement by the police. *United States v. Bowles*, 625 F.2d 526, 532 (5th Cir. 1980) (blocking the path of the suspect walking through an airport concourse); *Mendenhall*, 446 U.S., at 554 (some physical touching might indicate a seizure). As one commentator has noted:

> "Since the test for a seizure depends ultimately on the finding of a restriction of freedom of movement or action (*i.e.*, the right to disengage and walk away), any physical action by the officer that impedes freedom of movement, or that could be interpreted reasonably as doing so, apparently would present the paradigmatic seizure."
>
> Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 Ohio St. L.J. 771, 792 (1982).

When requested for his identification, Petitioner was seated on the hood of the car confronted by two armed officers in uniform both standing 1-2 feet in front of him. The only way for Petitioner to disengage from this encounter would be to clamber over the hood of the car, or push his way past the officers.

The presence of two armed police officers surrounding Petitioner, trapping him on the hood of the car, certainly would serve to further decrease a reasonable person's feeling that he or she was free to leave.

C. THE POLICE OFFICER'S VERBAL ACTIONS INDICATE THAT A SEIZURE HAD TAKEN PLACE.

An additional factor to be taken into account in determining whether a seizure has occurred is the verbal communications of the police officers. An evaluation of a police officer's verbal communications may require the consideration of such subtle concerns as the language used and the officer's tone of voice. *Mendenhall*, 446 U.S., at 554.

This Court recognized in *Delgado* that while police questioning, *by itself*, is unlikely to result in a Fourth Amendment violation, when a person refuses to answer a question posed by the police, and the police take additional steps to obtain an answer, a seizure has occurred, requiring some minimal level of objective justification. 466 U.S., at 216-217. Furthermore, when the encounter is prolonged by the officer seeking and examining documents or property, "the encounter begins to resemble, and reasonably could be perceived as, a formal investigation with the attendant implication that the citizen is not free to terminate it at will." Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 Ohio St. L.J. 771, 795-796 (1983).

LaFave suggests that "an encounter becomes a seizure if the officer engages in conduct which a reasonable

man would view as threatening or offensive even if performed by another private citizen." La Fave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.2(b), Vol. 3, p. 415 (1987).

In the present case Petitioner was confronted by police officers asking questions which were both accusatory and offensive in nature, geared toward exposing a criminal act. The Court of Appeal itself admitted that the statements were accusatory, and expressed suspicion. *People v. Lopez*, 212 Cal.App.3d 289, 293 (1989). Undoubtedly, a challenging inquisition as to the whereabouts of petitioner's pool stick following his assertion that he was waiting to play pool would be considered offensive conduct, even if performed by another private citizen. Petitioner was being called a liar.

Petitioner's refusal to answer the previous question was met only with the even more intrusive request for him to produce his identification. As Justice Marshall observed, "Under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law." *Schneckloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting). It is clear Petitioner's answers did not satisfy the officers. Any reasonable person would presume the follow-up request for identification had escalated the encounter and that he was not free to leave or ignore the request.

D. THE POLICE OFFICERS FAILED TO ADVISE PETITIONER THAT HE WAS FREE TO LEAVE.

Although the courts have been nearly unanimous in holding that an affirmative warning is not required each time police officers seek the cooperation of a citizen,

Schneckloth v. Bustamonte, 412 U.S. at 231, the absence of such a warning is a factor that has been considered in determining whether a seizure has taken place. *Dunaway v. New York*, 442 U.S. 200, 212 (1979), (seizure found where, *inter alia*, defendant was never informed that he was "free to go.") In *Florida v. Royer*, 460 U.S. 491 (1983), this Court recognized that informing a suspect that he was free to leave could serve to obviate the claim that the encounter was anything but a consensual matter. 460 U.S. at 504.

Petitioner acknowledges that there are very sound policy reasons for not requiring police officers to inform citizens of their right to be silent or their right to leave when the police are engaged in "general on-the-scene questioning of citizens as to facts surrounding a crime or other general questioning of citizens in the fact-finding process." *Schneckloth*, 412 U.S. at 232. However, the coercive tactics employed by the police in this case go far beyond the simple requests for information surrounding a crime that any person should give as an act of "responsible citizenship." 412 U.S. at 232.

No reasonable person in Petitioner's place would feel that they were being asked as a responsible citizen to assist in law enforcement. On the contrary, it seems clear Petitioner was the subject of a particularized investigation by the police which focused on him. Such apparently coercive tactics, if not supported by reasonable suspicion, should be accompanied by reasonable assurances from the officers that the citizen has not been seized.

II.

A FINDING THAT A SEIZURE OCCURRED IS CONSISTENT WITH EXISTING CASE LAW.

Neither *Royer* nor *Delgado* compel the result reached in this case, contrary to the Court of Appeal's ruling. Those cases simply contain language which indicates that a request for identification, "by itself", does not render the encounter a seizure. In the case at bar, the actions of the police constituted much more than just a request for identification by itself.

In *Florida v. Royer*, 460 U.S. 491 (1983), the defendant was approached by two DEA agents at an airport who believed he fit the "drug courier profile." He was approached and asked for identification and his airplane ticket. When the agents observed that the names on the two did not correspond, the agents identified themselves as narcotics investigators and told the defendant that they suspected him of transporting narcotics. Without returning his license and ticket, the agents asked him to accompany them to an interview room, where a subsequent search of his luggage resulted in the discovery of marijuana.

A majority of this Court found that no seizure had occurred when the officers merely asked for and examined defendant's identification. However, the Court found he had been seized when the officers identified themselves as narcotics agents, told him he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his belongings and without indicating in any way that he was free to depart. *Id.*, at 501.

The facts of the present case differ from *Royer* in several important respects. First, except for identifying themselves as policemen, which the Court held does not by itself constitute a seizure, the officers in *Royer* did not display a show of authority. Secondly, they did not obstruct the suspect's movement. Finally, before he was effectively seized, the officers had only made a request for identification "by itself." This request was not the culmination of a series of offensive, accusatory questions.

INS v. Delgado, 466 U.S. 210 (1984), involved investigatory inquiries made of suspected aliens during a sweep of a factory. In *Delgado*, INS agents placed themselves near the exits of the factory while other agents went through the factory and questioned employees about their citizenship. During the sweep the employees went about their business, and were not prevented by the agents from moving about the factories. No accusatory questions were asked of the workers; they were merely asked where they were from and, in some cases, for their identification. This Court specifically noted that,

> "if the person refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." 466 U.S. at 216.

The present case presents a significantly different factual scenario than that which existed in *Delgado*, First of all, while *Delgado* involved agents making inquiries of many employees in a wide open factory setting, in this case, Petitioner was the focus of a particularized investigation specifically focused on him in a very confining

atmosphere. Whereas in *Delgado* the employees were free to move about the factory and to leave if they so chose, in this case, Petitioner's movement was obstructed by the officers. Finally, in *Delgado* the workers merely were asked non-offensive, non-accusatory questions about their citizenship. Here, after he chose not to respond, Petitioner was asked questions which were both offensive and accusatory.

As shown above, *Royer and Delgado* simply do not compel the result reached by the Court of Appeal. A finding in this case that Petitioner had been seized not only will leave existing case law intact, but will provide much needed guidance for both lower courts and for police officers. Most importantly, it will assure that our highly cherished freedom from governmental intrusion and our civilized notions of justice are preserved intact.

CONCLUSION

Accordingly, for all the aforementioned reasons, Petitioner respectfully urges this court to grant his petition and reverse the decision of the California Court of Appeal.

Respectfully submitted,

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EXHIBIT A

[No. G006708. Fourth Dist., Div. Three. July 19, 1989.]

[As modified Aug. 8, 1989.]

THE PEOPLE, Plaintiff and Appellant, v. SERVANDO NAJERA LOPEZ, Defendant and Respondent.

COUNSEL

Cecil Hicks, District Attorney, Michael R. Capizzi, Maurice L. Evans, Assistant District Attorneys, Thomas M. Goethals, E. Thomas Dunn and Andrea Burke, Deputy District Attorneys, for Plaintiff and Appellant.

Ronald Y. Butler, Public Defender, under appointment by the Court of Appeal, Carl C. Holmes, Thomas Havlena and Ronald E. Klar, Deputy Public Defenders, for Defendant and Respondent.

OPINION

CROSBY, J. – (1a) The question presented here is whether a police request for identification during a street encounter amounts to a detention in the sense that a reasonable person would not feel free to leave under the circumstances and must be grounded upon some reasonable suspicion. The answer is no.

I

Santa Ana Police Corporal Richard Reese, a 13-year veteran, and a recruit were patrolling for narcotics traffickers in a parking lot on October 22, 1986. The officers saw Lopez sitting on the hood of a car. Reese "thought

[he] recognized [Lopez] from some prior encounter" but "just couldn't remember where," so he initiated the following conversation as they walked by: "And I happened to ask him as I was passing if that was his car. And he said 'No, it's not my car.' [¶] And then I asked him why he was sitting on that car, and he told me he was waiting for his friends to play pool. At this time I came to a stop . . . and looked back at him and asked him, if he was waiting for his friend to play pool, where his pool stick was. He didn't reply at that time. [¶] And I asked him, did he have an I.D. card or did he have I.D.; and he reached into his left front pocket and handed his wallet to [the recruit]."

The wallet was opened, a bindle "pop[ped] up," and Lopez was arrested after the officers confirmed it appeared to contain cocaine. More narcotics were found during a postarrest search.[1]

II

The district attorney concedes the officers had no reasonable justification to detain Lopez before the contraband was discovered. But, contrary to the trial court's conclusion, it is quite clear police do not need to have a reasonable suspicion in order to ask questions or request identification: "[O]ur recent decision in [*Florida v. Royer*

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[1] The officer described the neighborhood's reputation and his experience in that locale. Reese had participated in "approximately [] 600 or 700" narcotics arrests in the area, which was "rampant [with] narcotics" and "occupied by about 100 percent undocumented aliens" who controlled a gang involved in car thefts.

(1983) 460 U.S. 491 (75 L.Ed.2d 229, 103 S.Ct. 1319] plainly implies that interrogation relating to one's identity or a request for identification by the police does not by itself constitute a Fourth Amendment seizure." (*INS v. Delgado* (1984) 466 U.S. 210, 216 [80 L.Ed.2d 247, 255, 104 S.Ct. 1758].) Of course, in theory the citizen can refuse and simply walk away. (See *Brown v. Texas* (1979) 443 U.S. 47 [61 L.Ed.2d 357, 99 S.Ct. 2637].) Whether this is an accurate assessment of street reality is not for us to decide. (See *People v. Contreras* (1989) 210 Cal.App.3d 450, 452 [258 Cal.Rptr. 361], opn. mod. 210 Cal.App.3d 1145e.) It is clearly the view of the current majority of the United States Supreme Court. (*INS v. Delgado, supra,* at pp. 216-217 [80 L.Ed.2d at p. 255].)

(2) That court holds no detention or Fourth Amendment seizure occurs until an encounter reaches the point where a reasonable person would not feel free to leave. (*Ibid.*) Thus, the key issue here is whether the officer's questions and the request for identification changed the consensual nature of the encounter to a detention: " '[A] person has been "seized" within the meaning of the Fourth Amendment . . . only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " (*Michigan v. Chesternut* (1988) 486 U.S. ___, ___ [100 L.Ed.2d 565, 571-572, 108 S.Ct. 1975]; see also *Florida v. Royer, supra,* 460 U.S. at p. 502 [75 L.Ed.2d at pp. 239-240]; *United States v. Mendenhall* (1980) 446 U.S. 544, 554 [64 L.Ed.2d 497, 509, 100 S.Ct. 1870] (plur. opn. of Stewart, J.); *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 790 [195 Cal. Rptr. 671, 670 P.2d 325].) **(1b)** The district attorney argues this "consensual ordeal" was trivial and did not implicate

Fourth Amendment concerns; i.e., there was no seizure of Lopez's person.

We agree *Royer* and *Delgado* compel the conclusion that no seizure occurred here under the Supreme Court's formulation. In *Royer* only one member of the court, Justice Brennan, adopted the position that a request for identification would reasonably cause an individual to believe he was not free to leave. (*Florida v. Royer, supra,* 460 U.S. at p. 511 [75 L.Ed.2d at p. 245] (conc. opn. of Brennan, J.).) The plurality opinion by contrast states, "Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for purposes of the Fourth Amendment." (*Id.*, at p. 501 [75 L.Ed.2d at p. 239].) Four justices approved that statement, notwithstanding their apparent determination that the officers had no reasonable basis to suspect Royer of criminal activity until they learned he was traveling under an assumed name. (*Ibid.*; see also *People v. Gonzales* (1985) 164 Cal.App.3d 1194 [211 Cal.Rptr. 74].) Subsequently in *Delgado* it became clear that a majority of the Supreme Court was in accord with this dictum. (*INS v. Delgado, supra,* 466 U.S. at pp. 216-217 [80 L.Ed.2d at p. 255].) Consequently, we hold that the request for identification was not enough to constitute a Fourth Amendment seizure.

(3) Nevertheless, questions of a sufficiently accusatory nature may by themselves be cause to view an

encounter as a nonconsensual detention. (*Wilson v. Superior Court, supra,* 34 Cal.3d at pp. 790-791.) In *Wilson* the officers told the defendant they " 'had received information that he [] would be arriving today from Florida carrying *a lot of drugs.*' " (*Id.*, at p. 790.) The questions asked in this case were much less accusatory than the statement in *Wilson*, but they are not the stuff of usual conversation among adult strangers either. They did indicate the officers suspected defendant of something, if only bad manners; and the degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention. (*Id.*, at p. 791, fn. 11.)[2]

(1c) The Officers were concededly on the prowl for narcotics dealers; and Reese recognized Lopez from a previous, but then unremembered, encounter (a drunk driving arrest, as it turned out). Lopez was not engaged in any apparently unlawful conduct, yet the officers stood on either side of him and launched into a short, albeit somewhat accusatory, interrogation. But the questions were brief, flip, and, most importantly, did not concern criminal activity. The statements in *Wilson*, by contrast, were heavily accusatory and related to serious criminal

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[2] The Court of Appeal has also focused on the form of the police request, stating "[i]t is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us. . . ." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 941 [237 Cal.Rptr. 840].) We think both form and content are important. But here, the officer testified his "general tone of voice, the demeanor of [his] conversation," was no different from those presumably gentlemanly qualities he displayed in the witness box.

conduct. The officers made no show of force or attempt to physically restrain Lopez, nor did they order him to remain. With all due deference to the trial court, we do not believe the undisputed evidence in this case meets the applicable legal standard, i.e., that "the circumstances [were] so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded. . . ." (*INS v. Delgado, supra,* 466 U.S. at p. 216 [80 L.Ed.2d at p. 255].)[3] If undocumented aliens would believe themselves free to go despite an immigration official's request for identification, a notion difficult for us to accept, Lopez could hardly have felt different. He at least should have been able to count on a winning suppression motion had he refused to produce identification or attempted to depart and been searched as a result. Under the rule currently in effect, however, his cooperation with the officers was his downfall.

Judgment reversed.

Scoville, P.J., and Sonenshine, J., concurred.

CROSBY, J., Concurring. – The instincts of the trial judge were absolutely correct. In the real world this defendant could not possibly have felt himself free to walk away

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[3] Although the facts before us closely resemble those of *Brown v. Texas, supra,* 443 U.S. 47, where a unanimous Supreme Court held a demand for identification during a street encounter was unlawful, the prosecution conceded there that the defendant was seized at the outset and would not have been allowed to leave without producing identification. (See *United States v. Mendenhall, supra,* 446 U.S. at p. 570, fn. 5 [64 L.Ed.2d at p. 520] (dis. opn. of White, J.).) That is not the case here, of course.

when his identification was requested, and it is almost laughable to think the officers would have let him do so. (See *Florida v. Royer* (1983) 460 U.S. 491, 511 [75 L.Ed.2d 229, 245, 103 S.Ct. 1319] (conc. opn. of Brennan, J.); *People v. Contreras* (1989) 210 Cal.App.3d 450, 452 [258 Cal.Rptr. 361], opn. mod. 210 Cal.App.3d 1145e.) Nevertheless, a solid majority of the United States Supreme Court is of the view that ordinary citizens and even undocumented aliens confronted by immigration officials would be aware that they could merely saunter off when asked to identify themselves and produce confirming documents. (*INS v. Delgado* (1984) 466 U.S. 210 [80 L.Ed.2d 247, 104 S.Ct. 1758].) The same majority also believes law enforcement agents would allow them to do so, another highly dubious proposition in my opinion. (See *Brown v. Texas* (1979) 443 U.S. 47 [61 L.Ed.2d 357, 99 S.Ct. 2637]; *People v. Contreras, supra,* at p. 452.)

Among the most fundamental of the liberties enjoyed by members of a free and open society is right to be left alone. Allowing police to demand identification without reasonable suspicion in ordinary street encounters and requiring those who would assert their rights to resist the police as the price of their freedom is unsound as a matter of constitutional law and sends exactly the wrong message to the citizenry. That message is: You are protected by the Fourth Amendment only to the extent you are willing to risk the physical violation of your person by armed officers. In accord with Justice Brennan, I believe we can do much better than that.

EXHIBIT B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,	G006708
Plaintiff and Appellant,	(Super. Ct. No. C-66443)
v.	ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING
SERVANDO NAJERA LOPEZ,	
Defendant and Respondent.	(Filed Aug 8, 1989)

The opinion filed July 19, 1989, and certified for publication is modified as follows:

(1) On page 6, line 4, insert the reference for footnote 2 at the end of the paragraph.

This modification does not effect a change in the judgment.

The petition for rehearing is DENIED.

CROSBY, J.
Crosby, Acting P.J.

I concur:
SONENSHINE, J.
Sonenshine, J.

EXHIBIT C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL
Fourth Appellate District, Division Three, No. G006708
S011719

IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA

IN BANK

THE PEOPLE, Appellant

v.

SERVANDO NAJERA LOPEZ, Respondent

(Filed Oct. 12, 1989)

Respondent's petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

KAUFMAN J.
Acting Chief Justice

EXHIBIT D

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in pertinent part:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . "

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws . . . "